STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2003
v	No. 234431 Monroe Circuit Court
HOWARD ANTHONY MONIZ, Defendant-Appellant.	LC Nos. 00-030408-FH; 00-030410-FC

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of unlawfully driving away an automobile (hereinafter "UDAA"), MCL 750.413, second-degree home invasion, MCL 750.110a(3), unarmed robbery, MCL 750.530, third-degree fleeing or eluding a police officer, MCL 257.602a(3), and resisting or obstructing a police officer, MCL 750.479. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of nineteen to thirty-five years for the unarmed robbery and home invasion convictions, six to thirty-five years for the fleeing or eluding and UDAA convictions, and 3-1/2 to 10 years for the resisting or obstructing a police officer conviction. Defendant appeals as of right. We affirm.

Defendant was charged with a series of offenses after he broke into a woman's home and tied the woman up. Defendant took jewelry from the home, as well as $150 from the woman's purse, and then, subsequently, drove off in the woman's car. Shortly thereafter, defendant engaged the police in a high-speed chase, which ended when defendant lost control of the vehicle and rolled it over into a field. After exiting the vehicle, defendant struggled with the arresting officer. The defense raised issues of insanity and diminished capacity at trial, and argued that defendant was unable to form the requisite specific intent to commit the charged crimes due to his intoxication.

I

Defendant first argues that the trial court erred by refusing to allow him to represent himself at trial. We disagree.

Early in this case, defendant asked that he be allowed to represent himself at trial because he did not believe that his appointed attorneys could devote the time necessary to properly

represent him. The trial court denied that request, but agreed to appoint a new attorney. Throughout the proceedings, defendant again repeatedly asked that he be allowed to represent himself. The trial court denied defendant's requests after considering the seriousness of the charges and the complicated defenses that defendant wanted to raise. The trial court also believed that defendant's conduct would unreasonably delay and disrupt the proceedings, possibly necessitating a mistrial.

A defendant has both a constitutional and statutory right to act as his own counsel, but the right is not absolute. *People v Dennany*, 445 Mich 412, 426-427; 519 NW2d 128 (1994); MCL 763.1. This right to self-representation conflicts with the right to counsel. Consequently, courts must indulge every presumption against a waiver of the right to counsel, which requires an intentional relinquishment or abandonment of the right to counsel. *People v Adkins (After Remand)*, 452 Mich 702, 720-721; 551 NW2d 108 (1996). The record or evidence must support a finding that the defendant intelligently and understandingly rejected the offer of counsel. *Id*. at 721. Where a trial court does not believe that the record reflects a proper waiver of the right to counsel, the court should state its reasons for this belief on the record and require counsel to continue to represent the defendant. *Id*. at 721, 727.

Before a court may allow a defendant to proceed in propria persona, it must find the following: (1) that the defendant's request is unequivocal; (2) that the defendant is asserting his right to proceed in propria persona knowingly, intelligently and voluntarily; and (3) that allowing the defendant to represent himself will not disrupt, unduly inconvenience and burden the court in the administration of its business. *Dennany, supra* at 432. Also, before a court may accept a defendant's waiver of the right to counsel, the court must satisfy the requirements of MCR 6.005[1] and advise the defendant of the risks of proceeding without counsel. *People v Belanger*, 227 Mich App 637, 642; 576 NW2d 703 (1998).

Here, the trial court substantially complied with MCR 6.005(D) when defendant made his initial request to represent himself. The trial court properly refused defendant's request because it was not unequivocal. Defendant indicated that he was making the request because he was dissatisfied with his attorney. The trial court agreed to appoint a new attorney, which satisfied defendant at the time.

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[1] MCR 6.005(D) provides, in relevant part:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
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> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
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> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Furthermore, even if defendant's subsequent requests for self-representation were unequivocal, the record supports the trial court's determination that allowing defendant to represent himself would have unduly disrupted the proceedings and inconvenienced the court. *Dennany, supra* at 432. When the trial court permitted defendant to argue his own pretrial motions, he raised several theories and arguments that were not relevant to the facts of the case. Moreover, defendant often refused to accept the trial court's rulings or conform his conduct to the decorum necessary for a courtroom. The trial court was justified in concluding that defendant's tactics and conduct would have unnecessarily delayed and disrupted the proceedings. Accordingly, the trial court did not err in denying defendant's request to represent himself. See *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998).

II

Next, defendant argues that the prosecutor committed misconduct in his closing argument. We disagree.

Claims of prosecutorial misconduct are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court reviews the prosecutor's remarks in context to decide if the comments deprived the defendant of a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Because defendant failed to object to the challenged remarks at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

In his closing argument, the prosecutor referred to defendant as a "con," and also referred to defendant's criminal record as a factor the jury should consider because the doctors who evaluated defendant relied upon his prior record in drawing their conclusions about his mental state.

The jury heard substantial testimony regarding defendant's prior criminal record, which dated back to 1982, when defendant was convicted of armed robbery. Defendant had two later convictions for breaking and entering with intent to commit larceny. The prosecutor introduced this evidence when cross-examining defendant's expert witness. The testimony was offered on the limited issue of defendant's sanity or state of mind at the time of the charged offense. Although defendant argues that much of the evidence was not admissible under MRE 609, the evidence in this case was not offered under that rule. MRE 609 does not bar evidence of a defendant's prior record where it is offered for some other proper purpose. *People v Douglas Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985). For this reason, defendant's arguments regarding MRE 609 are not relevant to this issue.

Where a defendant raises an insanity defense, any evidence relating to the defendant's conduct is admissible. *People v Lipps*, 167 Mich App 99, 109; 421 NW2d 586 (1988). For instance, testimony concerning prior arrests, convictions or other antisocial conduct is material to the issue of the defendant's sanity. *Id*. Such evidence is generally not barred by MRE 404(b). *People v Simonds*, 135 Mich App 214, 218-219; 353 NW2d 483 (1984); see also *People v McRunels*, 237 Mich App 168, 182-183; 603 NW2d 95 (1999). Thus, the prosecutor here did not commit plain error by relying on, and referring to, the pertinent testimony as substantive evidence

in arguing that defendant was not insane at the time of the offense. Furthermore, considered in context, the prosecutor's isolated reference to defendant as a "con," a characterization that was immediately rephrased, did not affect defendant's substantial rights. Accordingly, this unpreserved issue does not warrant appellate relief. *Carines, supra* at 761-767; *Schutte, supra* at 720.

III

Defendant raises ten additional issues in a pro se supplemental brief. Defendant has failed to support many of his claims of error with appropriate citations to the record, thereby limiting our review. Where a party fails to properly support his arguments, this Court need not address the issue. It is not for this Court to discover and rationalize the basis for a claim of error. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). See also MCR 7.212(C)(7). Upon review of defendant's issues to the extent possible, we find them to be without merit.

A

Defendant claims that his expert witness, Dr. Briskin, refused to assist him in his defense by failing to consider all relevant information, thus, violating his right to due process and equal protection.

Defendant is correct that, under the constitutional Due Process and Equal Protection Clauses, he had the right, as an indigent defendant, to the appointment of a psychiatrist to assist him in his defense once he established that his sanity was an issue at trial. *People v Leonard*, 224 Mich App 569, 580-582; 569 NW2d 663 (1997); *People v Stone*, 195 Mich App 600, 604-605; 491 NW2d 628 (1992). However, this right is only to a competent psychiatrist appointed by the court. *Stone, supra* at 605-606. A defendant does not have the right to choose an expert to his liking or receive money to hire his own expert. The court's appointment of an independent expert is generally sufficient to satisfy the constitutional standards. *Id*. at 606. Nonetheless, MCL 768.20a(3) allows an indigent defendant the right to the appointment of a psychiatrist of his own choosing.[2]

Here, the record discloses that defendant was interviewed by Dr. Briskin and, presumably, had the opportunity to discuss any facts that he wanted Dr. Briskin to consider. Defendant's trial counsel assured the court that he would contact Dr. Briskin about meeting with defendant again before trial to review any information that defendant wanted Dr. Briskin to consider. It is not apparent from the record that Dr. Briskin refused to cooperate with the defense

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[2] MCL 768.20a(3) provides, in relevant part:

> (3) The defendant may, at his or her own expense, or if indigent, at the expense of the county, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. . . .

by not considering defendant's position. Additionally, this case is factually distinguishable from *People v McPeters*, 181 Mich App 145, 150-152; 448 NW2d 770 (1989). In the present case, there is nothing in the record to support defendant's claims that Dr. Briskin refused to cooperate with the defense, other than defendant's unsupported allegations. Accordingly, we find no merit to this issue.

B

Defendant argues that his constitutional right against compelled self-incrimination under the Fifth and Fourteenth Amendments was violated because he was required to undergo a psychiatric examination by the prosecution's expert from the Center for Forensic Psychiatry. This argument also lacks merit.

A defendant who files a notice of intent to raise an insanity defense must undergo a psychiatric examination at the Center for Forensic Psychiatry. See MCL 768.20a(2). The defendant is required to cooperate with that examination or his right to raise an insanity defense may be waived. MCL 768.20a(4). Any statements made by the defendant during the examination are admissible only on the issue of the defendant's mental illness or insanity at the time of the charged offense. MCL 768.20a(5).

Despite his statements to the contrary on appeal, the record indicates that defendant filed a notice of his intent to raise an insanity defense, and therefore, he was subject to examination by the state's own expert. MCL 768.20a(2). Defendant could not properly raise an insanity defense if he refused to comply with MCL 768.20a. See *People v Hayes*, 421 Mich 271, 279-283; 364 NW2d 635 (1984). Therefore, it was not improper for Dr. Kelland to examine defendant before trial or to testify as a rebuttal witness concerning defendant's mental state. Even if Dr. Kelland's examination occurred before defendant filed his notice of intent to raise an insanity defense, because defendant subsequently filed the required notice, the examination and resulting testimony were not improper. Moreover, compelling a defendant to undergo a psychiatric examination on the issue of his criminal responsibility does not violate the defendant's right against self-incrimination if the information obtained is used for that purpose only. *People v Dobben*, 440 Mich 679, 699; 488 NW2d 726 (1992) (Levin, J., dissenting); *People v Wright*, 431 Mich 282, 286-287; 430 NW2d 133 (1988). Here, Dr. Kelland properly limited her testimony to defendant's mental state only, and thus, defendant's right against self-incrimination was not violated.

Defendant appears to further argue that Dr. Kelland's testimony should have been suppressed for failure to comply with MCL 330.2028(1). That statute applies only to competency examinations. Defendant's competency to stand trial was not an issue. Furthermore, even if Dr. Kelland did not comply with that statute, that would not be a basis for suppressing her trial testimony regarding defendant's criminal responsibility for these offenses.

C

Defendant argues that the trial court erroneously failed to consider some of his pro se motions. We find no merit to this issue.

Despite being represented by counsel throughout these proceedings, the trial court initially allowed defendant to argue some of his own motions. Later, however, the court insisted that all motions be presented through his attorney. This was not error. A defendant does not have a right to hybrid representation. *People v Kevorkian,* 248 Mich App 373, 419-422; 639 NW2d 291 (2001). "[A] defendant has a constitutional entitlement to represent himself or to be represented by counsel—but not both." *Id.* at 422, quoting *Dennany, supra* at 442. Because defendant was represented by counsel, he did not have the right to argue his own motions.

Defendant also argues that the trial court's ruling deprived him of the effective assistance of counsel. However, defendant does not indicate what meritorious issues he wanted to raise, which were not pursued by his attorney. It is not for this Court to discover and rationalize the basis for a claim of error. *Joerger, supra* at 178. Therefore, defendant has not shown that he was deprived of the effective assistance of counsel. *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994).

D

Defendant again argues, in Issues V and VI of his pro se brief, that he did not receive the effective assistance of counsel. The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999). Because this issue was not pursued at an evidentiary hearing in the trial court, our review is limited to errors apparent on the existing record. *People v Robert Riley,* 468 Mich 135, 139; 659 NW2d 611 (2003).

In order for this Court to reverse due to ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *Pickens, supra* at 338. The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr,* 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant claims that his attorneys were ineffective for advising him to waive a preliminary examination, failing to properly present certain evidence, failing to challenge the credibility of the prosecution's witnesses, and failing to properly present diminished capacity as a defense theory.[3] All of the alleged errors relate to matters of trial strategy. This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Marcus Davis,* 250 Mich App 357, 368; 649 NW2d 94 (2002). Counsel's testimony explaining why counsel pursued or did not pursue certain strategies is necessary to a proper resolution of this issue. It is not apparent from the existing record that the conduct of defendant's attorneys

[3] With regard to defendant's claim that counsel failed to properly present a diminished capacity defense, we note that our Supreme Court has since clarified that there is no diminished capacity defense available in Michigan. *People v Carpenter,* 464 Mich 223, 225-226; 627 NW2d 276 (2001).

was objectively unreasonable. Moreover, when defendant complained before trial that his attorneys were ineffective, the court agreed to appoint new counsel. Because defendant was appointed new counsel before trial, he cannot show that he was prejudiced by any alleged deficient conduct of his earlier attorneys. *Pickens, supra*. Thus, defendant has not shown that he was deprived of the effective assistance of counsel. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

E

Defendant argues that the trial court erred by refusing to conduct an evidentiary hearing on the claim of entrapment. We disagree.

The test for entrapment provides that "a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Jessie Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002). Defendant argued to the trial court that the police instigated or induced him to commit all of the offenses in this case because he was very ill and left stranded by the police, after his car went off I-75, in an unfamiliar neighborhood. The police offered to give defendant a ride to his girlfriend's house after his car was towed, but defendant claimed that the officer lied to him and dropped him off at another location. Defendant claimed that he was "ripped off" (because he had to pay the towing cost) and "drug across this country" back to Michigan for illegal and false reasons (for his parole violation). Defendant further claimed that he was "kept unemployed," although he had been a computer programmer in the Silicon Valley. There is no merit to the claim that police or government officials induced defendant to commit any crime, and the police conduct was not so reprehensible that it cannot be tolerated. The facts alleged by defendant, even viewed most favorably to him, failed to support a possible claim of entrapment. *Jessie Johnson, supra* at 498. Therefore, the trial court was not required to conduct an evidentiary hearing with regard to whether defendant was entrapped.

F

Next, defendant argues that his rights were violated because of the conditions during his pretrial detention at the county jail. We find no merit to this issue.

Because defendant was represented by counsel throughout these proceedings, and he has not shown that his attorneys were not competent, the state was not required to provide him with access to a law library. *People v Yeoman*, 218 Mich App 406, 415; 554 NW2d 577 (1996).

The record does not factually support defendant's additional claims that he was denied medical treatment and subject to inhumane treatment at the county jail. Furthermore, defendant does not explain how any alleged mistreatment at the jail affected the jury's verdict. Thus, appellate relief is not warranted.

G

Next, defendant argues that certain information that he wanted considered by the trial court at sentencing was omitted from the presentence investigation report. Because defendant did not challenge the accuracy of the presentence report at sentencing, this issue is not preserved. MCR 6.429(C). Therefore, we limit our review to plain error affecting defendant's substantial rights. *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000).

Defendant does not explain what information he provided to the probation officer that was not included in the presentence investigation report. Furthermore, the record discloses that defendant's statement was attached to the PSIR, and that defendant was allowed to address the court at length before his sentences were imposed. Under the circumstances, defendant has failed to show a plain error affecting his substantial rights. *McCrady*, *supra* at 32.

H

Defendant also appears to argue that the trial judge was biased against him. This issue was not properly raised in the trial court. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 761-767.

Defendant has failed to indicate, with appropriate citations to the record, where the judge allegedly made biased remarks. Moreover, our review of the record fails to disclose factual support for defendant's claim that the trial judge was biased against him on account of his race or ethnicity. Thus, defendant has not established plain error. *Carines*, *supra*.

I

Finally, in light of the foregoing, we reject defendant's argument that the cumulative effect of multiple errors deprived him of a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen